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IN THE

Supreme Court of the United States

WARREN CHRISTOPHER,
FORMER SECRETARY OF STATE, ET AL., *Petitioners*

v.

JENNIFER K. HARBURY
Respondent.

On Writ Of Certiorari
To the United States Court Of Appeals
For The District of Columbia Circuit

BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA AMICUS CURIAE IN SUPPORT OF RESPONDENT

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BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

IDENTITY AND INTEREST OF AMICUS CURIAE

The Association of Trial Lawyers of America ("ATLA") respectfully submits this brief as amicus curiae in this case. Letters from Petitioner and Respondent granting consent to the filing of amicus curiae briefs have been filed with this Court. [1]

[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Amicus Curiae, its members, or its counsel make a monetary contribution to the preparation of submission of this brief.

ATLA is a voluntary national bar association whose approximately 50,000 trial lawyer members primarily represent individual plaintiffs in civil actions.

ATLA's members are keenly aware of the importance of protecting and preserving the constitutional right of access to the courts for the redress of grievances. This right has served as a cornerstone of our system of justice and orderly government. ATLA's mission includes the defense of this right against those who would shut the doors of the courthouse for the sake of expediency.

SUMMARY OF THE ARGUMENT

1. The right of access to the courts to seek judicial remedy is a fundamental bedrock principle of the English common law, rooted in the Magna Carta. At the time the Due Process Clause was adopted, the right of access was established as fundamental principle of liberty, limiting the abuse of power by all parts of government. It is among the most important of the rights and liberties of the common law that Americans guaranteed for themselves in the Due Process Clause.

Nor did the drafters of the Bill of Rights view the right of access as narrowly applicable to barriers faced by prisoners and institutional barriers to litigants. Rather, the historical context in which the Due Process Clause was enacted indicates that they viewed the ability to sue government officials as an important safeguard of constitutional rights.

2. The decision below does not create a new or novel constitutional right, but reflects the application of well-established law. The right of access to the courts to seek legal remedy has been recognized thoughout our

history as a fundamental right. Moreover, a significant number of federal courts of appeals have applied that right in circumstances analogous to those presented in this case. Those courts have uniformly held that government officials who engage in a cover-up to conceal the circumstances surrounding a crime, for the purpose of preventing legal action by the victims or their families, may be liable for violation of the right of access to the courts.

This Court should reject the invitation by the United States to create a special immunity for government officials who issue false information in response to inquiries perceived to touch on national security. It is not the case that government official need to issue disinformation to do their jobs. Indeed, the Department of Defense has recently rejected such a policy. The principle that truthfulness on the part of government officials best serves the interests of the American people is, and ought to be, the law of the land.

ARGUMENT

I. THE RIGHT OF ACCESS TO THE COURTS TO SEEK LEGAL REMEDY IS AN IMPORTANT FUNDAMENTAL CONSTITUTIONAL RIGHT.

Petitioners' primary argument, supported by the Solicitor General, characterizes the right of access to the courts as confined to the state's obligations to prisoners and to narrow "institutional mechanisms," such as the fee requirement in *Boddie v. Connecticut*, 401 U.S. 371 (1971). Pet. Br. at 13. *See also* Brief of United States at 12 (the right of access extends no further "than protecting the ability of an inmate to prepare a petition or complaint"). Conflating plaintiff's constitutional right

and defendants' qualified immunity for its violation, they assert that the court below established a novel right of access that was not previously "well-established." Pet. Br. at 40-41; Brief of United States at 24.

ATLA respectfully submits that the right of access to the courts to seek judicial remedy is a fundamental bedrock principle of the English common law, rooted in the Magna Carta. It is among the most important of the rights and liberties of the common law that Americans guaranteed for themselves under the Due Process Clause as well as the First Amendment. The drafters of the Bill of Rights did not view the right of access as narrowly confined. Indeed, they viewed access to the courts to sue government officials as an important safeguard against abuses of power. Federal courts have recognized the broad scope of this right, permitting a cause of action by family members against government officials who intentionally deprived them of access to civil remedies by misrepresenting and covering up the circumstances of the deaths of their loved ones. The decision below does not stray from that long and familiar path.

A. The Right Of Access To The Courts To Seek Legal Remedy Is A Fundamental Right Secured By The Due Process Clause.

As Justice Powell observed;

> The Due Process Clause of the Fifth Amendment, later incorporated into the Fourteenth, was intended to give Americans at least the protection against governmental power that they had enjoyed as Englishmen against the power of the Crown. The liberty preserved from deprivation without due process included the right 'generally to enjoy those privileges long recognized at common law as

> essential to the orderly pursuit of happiness by free men.'

Ingraham v. Wright, 430 U.S. 651, 673 (1977), quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). *See also Hurtado v. California*, 110 U.S. 516, 535 (1884) (due process consists of "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions").

Among those essential privileges is the right to obtain redress from the courts. Early in our nation's history, Chief Justice Marshall declared:

> [T]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

This right of access to justice is so fundamental that this Court has held that the Fourteenth Amendment includes "the duty of every State to provide, in the administration of justice, for the redress of private wrongs." *Missouri Pacific Ry. Co. v. Humes*, 115 U.S. 512, 521 (1885).

The origins of that right, and its exercise free from improper interference by government officials, are firmly rooted in the Magna Carta of 1215. The barons at Runnymede, determined to end the king's manipulation of the courts for his own purposes, particularly through the sale of writs, compelled King John to vow in Chapter 40: "To no one will we sell, to

no one will we refuse or delay, right or justice."[2] The reissued Magna Carta in 1225 combined this provision with the seminal due process guarantee of Chapter 39,[3] into Chapter 29. In the words of Sir Edward Coke, Chapter 29 guaranteed that,

> every subject of this realme, for injury done to him...by any other subject... without exception, may take his remedy by the course of the law, and have justice, and right for the injury done to him, freely without sale, fully without any deniall, and speedily without delay.

1 Edward Coke, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND *55 (London, E.&R. Brooke 1797).

Nearly everything the drafters of the United States Constitution understood of this principle was learned from Coke. His explication of the Magna Carta, first published in 1642, (and in America in) was widely read by the Founding generation. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 29 (1991) (Scalia, J., concurring in judgment) ("The American colonists were intimately familiar with Coke"); A.E Dick Howard, THE ROAD FROM RUNNYMEDE 119-25 (1968). Moreover, Lord Coke's explication of Chapter 29 was restated with approval by William Blackstone, whose treatise was also widely studied by 18th Century Americans. 1

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2 See William Sharp McKechnie, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 22-122 (2d ed. rev. vol. 1914).

3 No freeman shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land.

Id.

William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND *141 (1765).

Coke elevated the Maga Carta to its status as the source of all the fundamental principles of the common law, in which all the rules familiar to common law lawyers are grounded. *See* Justice Leeson's extensive and scholarly analysis in *Smothers v. Gresham Transfer, Inc.*, 23 P.3d 333, 339-50 (Ore. 2001). Coke vigorously asserted the primacy of these principles as a limitation on the power of all government.

He certainly viewed it as a limit on the authority of Parliament. As a judge, he upheld that limitation in *Doctor Bonham's Case*, 8 Co. Rep. 107a, 118a; 77 Eng. Rep. 638, 652 (C.P. 1610). The colonists frequently looked to Coke in their complaints that Parliament exceeded its authority in enacting the Stamp Acts and other hated statutes. Laurence H. Tribe, *Indiana's Medical Malpractice Reform*, 31 Ind. L. Rev. 1089, 1090-91 (1998); Ned Miltenberg *The Revolutionary 'Right To A Remedy,'* Trial, March, 1998, at 48-49.

Lord Coke was equally concerned with Chapter 29 as restriction on executive power. He asserted that the King could not consult with judges about pending cases and could not stop or delay proceedings in the common-law courts. King James eventually removed Lord Coke as chief justice of the King's Bench after Coke precipitated several crises to test this principle. *See* Judge William C. Koch, Jr., *Reopening Tennessee's Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution*, 27 U. Mem. L. Rev. 333, 361 (1997).

From this perspective, the right to access and remedy is essential to judicial independence. *Id.* Courts have no roving commission to do justice. They must

wait for cases to come to court. Executive or legislative intervention to close the courthouse doors or prevent litigants from walking through them threatens the ability of the judicial branch to perform its constitutional function.

The degree to which this right is deemed fundamental to the American system of justice is reflected in the fact that 38 states have incorporated in their state constitutions provisions guaranteeing the right of access and remedy patterned after Coke's language. *See* David Schuman, *The Right to a Remedy*, 65 Temp. L. Rev., 1197, 1201 n. 25 (1992) (listing state constitutional provisions).

Although the U.S. Constitution does not contain a similar express guarantee, the adoption by the First Congress of the Fifth Amendment guarantee of due process was an "affirmation of Magna Charta according to Coke." Haslip at 29 (Scalia, J., concurring). This Court has left no doubt that access to the courts is a fundamental right. *Chambers v. Baltimore & O. R.R.*, 207 U.S. 142, 148 (1907) ("The Right to sue and defend in the courts is the alternative to force. In an organized society it is the Right conservative of all other rights and lies at the foundation of orderly government.")

B. The Right to Access Was Intended to Include the Right to Pursue Legal Redress Against Government Officials For Constitutional Violations.

Petitioner and the United States would confine the right of access to the barriers faced by prisoners and certain institutional barriers. The Solicitor General in particular argues that it is "unfathomable" that the Founders could have intended that false statements by

government officials give rise to suit for constitutional violations. Brief of United States at 23.

The Americans who drafted the Bill of Rights and guaranteed for themselves the common law rights developed under English law had their own views beyond those of Coke and Blackstone. As a historical matter, it is certain that they did not view the right of access to the courts as limited to prisoners or a narrow set of institutional restrictions.

This Court has observed that the cases involving John Wilkes were fresh in the minds of those who drafted the Bill of Rights. *Boyd v. United States*, 116 U.S. 616, 626-27 (1886). Indeed, Wilkes' successful lawsuit against England's under secretary of state, Robert Wood, "was probably the most famous case in late eighteenth century America." Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 772 (1994).

The Wilkes cases stemmed from an anonymous article in issue No. 45 of the *North Briton* which harshly criticized Prime Minister Grenville's address to Parliament, accusing Grenville of lying to the people of England with respect to the conduct of foreign affairs. Secretary of State Lord Halifax authorized an illegal general warrant for the arrest of those suspected of involvement. The King's messengers arrested 49 persons, including John Wilkes, a flamboyant opposition member of Parliament, who was the author. Many, including Wilkes, brought suit seeking damages for the deprivation of their rights.

The Wilkes affair generated a clutch of decisions establishing the illegality of general warrants and the authority of juries to award exemplary damages to punish and deter such oppression. *See Huckle v. Money*,

2 Wils. 205, 95 Eng.Rep. 768 (C.P.1763); and *Wilkes v. Wood*, Lofft 1, 98 Eng.Rep. 489 (C.P.1763) In *Wilkes v. Halifax*, 19 How. St. Tr. 1406 (C.P. 1769), Wilkes was awarded the substantial sum of 4,000 pounds against the Secretary of State himself. Accounts of the Wilkes cases appeared in newspapers and pamphlets throughout the colonies. Thomas Y. Davies, *Recovering The Original Fourth Amendment*, 98 Mich. L. Rev. 547, 564-65 & n.25 and 631 n.222 (1999). The broad power of the civil jury to award punitive damages, announced by Lord Camden in *Wilkes v. Wood*, was one of the rights of English subjects that Americans sought to preserve, giving impetus to the adoption of the Seventh Amendment, and to ratification of the constitution itself. *See*, Alan Howard Scheiner, *Judicial Assessment of Punitive Damages, and the Politics of Jury Power*, 91 Colum. L. Rev. 142, 156-60 (1991).

A related case involved John Entick, a Wilkes associate and the author of the *Monitor*, to which Wilkes was a sometime contributor. He, too, was the victim of a general warrant and successfully sued the responsible officials. Lord Camden's opinion in *Entick v. Carrington*, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (1765), was pronounced by this Court as a "landmark" of liberty and "monument" of English freedom with which "every American statesman, during our revolutionary and formative period as a nation, was undoubtedly familiar." *Boyd*, at 626.

This history makes clear that those who drafted and adopted the Due Process guarantee did not view the right of access to the courts as a narrow, barely tolerated burden on government. Rather, they viewed the right to seek legal redress against government officials as an effective means of enforcing constitutional rights and preserving liberty from abuse

of power. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 786 (1994) ("In America, both before and after the Revolution, the civil trespass action tried to a jury flourished as the obvious remedy against haughty customs officers, tax collectors, constables, marshals, and the like.")

For Americans to turn to the courts for legal redress is not "cause for consternation." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 643 (1985) Rather,

> That our citizens have access to their civil courts...is an attribute of our system of justice in which we ought to take pride. The State is not entitled to interfere with that access by denying its citizens accurate information about their legal rights.

Id.

II. THE CONDUCT OF OFFICIALS ALLEGED IN THIS CASE VIOLATED WELL ESTABLISHED LAW.

A. It Is Well Established That Official Misrepresentations To Cover Up The Circumstances Of A Crime For The Purposes Of Avoiding Legal Action Violates Access To The Courts.

Petitioners, seeking qualified immunity for their concealment of the government's role in Bamaca's fate, deny that their conduct violated clearly established constitutional rights at the time of the events or that a reasonable official would have understood that such conduct would violate that right. Pet. Br. at 39 & 40.

In view of the historical developments described in Part I, *supra*, the right of access to the courts cannot be characterized as "a constitutional right that had not yet been declared" in 1993-94. *See* Pet. Br. at 41.

It is true that most of this Court's access-to-court decisions address the barriers faced by prisoners. *E.g., Bounds v. Smith*, 430 U.S. 817 (1977). However, the courts of appeals have applied the right of access in circumstances closely analogous to this case. Their decisions reflect a well-established consensus that officials who engage in a cover-up of circumstances surrounding a killing, including concealment of government involvement, may violate the rights of family members to seek legal remedy in court.

Ryland v. Shapiro, 708 F.2d 967 (5th Cir. 1983), held that the parents of a woman murdered by a prosecutor could maintain an action under 42 U.S.C. § 1983 against a district attorney and other officials, based on allegations that defendants falsified a death certificate and took other actions to cover up the circumstances of the murder, thus interfering with plaintiffs' right to pursue a state wrongful death action. The Fifth Circuit noted that it is "well established today that [the right of access to the courts] is one of the fundamental rights protected by the Constitution," citing this Court's recognition that the right is protected under the Due Process Clause and the First Amendment right of petition. *Id.* at 972. The court found that defendants' cover-up deprived plaintiffs of access that is "adequate, effective, and meaningful." *Id.*, quoting *Bounds v. Smith*.

Similarly, the court in *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984), upheld a jury verdict in favor of the family of a man fatally shot by a police

officer. Evidence showed that defendants, including the chief of police, conspired to conceal the facts relating to victim's death by falsifying police reports and planting a gun on victim, preventing plaintiffs from recovery in a wrongful death action. The court stated that "a conspiracy to cover up a killing, thereby obstructing legitimate efforts to vindicate the killing through judicial redress, interferes with the due process right of access to courts." *Id.* at 1261.

The court rejected a narrow interpretation of the right, similar to Petitioner's argument here:

> To deny such access defendants need not literally bar the courthouse door or attack plaintiffs' witnesses. This constitutional right is lost where, as here, police officials shield from the public and the victim's family key facts which would form the basis of the family's claims for redress.

Id.. *See also Williams v. City of Boston*, 784 F.2d 430, 435 (1st Cir. 1986) (Where parents of a high school student fatally shot at a football game asserted that officials concealed facts indicating negligence on the part of the city, the court citing *Bell*, stated that "official cover-up may violate section 1983 if it deprives the plaintiff of his right of access to the courts"; however, plaintiffs failed to raise this claim in the trial court); *Agresta v. Sambor*, 687 F. Supp 162, 167 (E.D. Pa. 1988) (parents whose adult son was fatally shot by Philadelphia police and who alleged that officials conspired to cover up the circumstances of their son's death, were entitled to maintain a civil rights action based on denial of their right of access to the courts).[4]

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[4] Misconduct that may violate the right of access is not limited to destruction or falsification of evidence. See Silver v. Cormier, 529 F.2d 161, 163 (10th Cir. 1976) (urban renewal official was liable for

In *Barrett v. United States*, 798 F.2d 565 (2d Cir. 1986), the estate of a patient who died in a state hospital filed a wrongful death action against the state. Many years later, the estate brought suit alleging that federal attorneys suborned perjury and impeded discovery in the state case. Their purpose was to conceal the fact that the patient's death was caused by injections supplied by the U.S. Army Chemical Corps in an experimental program testing chemical warfare agents and to prevent litigation against the federal government. Significantly, the court pointed out that the federal officials,

> were not under any duty to volunteer to the estate information that would alert it to the existence of a claim against the federal government and certain of its officials for Blauer's wrongful death. On the other hand, the government officials were not free to arbitrarily interfere with the estate's vindication of its claims. Unconstitutional deprivation of a cause of action occurs when government officials thwart vindication of a claim by violating basic principles that enable civil claimants to assert their rights effectively. Although in 1953-55 courts may not have explicitly stated this principle, they had clearly ennunciated that the Constitution protects causes of action from arbitrary interference.

Id. at 575.

The Sixth Circuit explicitly adopted the principle set forth in *Ryland* and *Bell* in *Swekel v. City of River Rouge*, 119 F.3d 1259, 1262 (6th Cir.1997), cert. denied, 522 U.S. 1047 (1998). In that case, the survivor of a

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violating the right of access to the courts of a property owner where he threatened to withhold a relocation expense payment if the property owner filed a lawsuit to challenge the amount he received for the property).

pedistrian who was fatally injured while crossing an intersection alleged that defendant police officers covered up evidence that the son of a high ranking police officer was driving the vehicle and impeded plaintiff's own investigation into the accident until the statute of limitations for a wrongful death action had passed. The court noted that a plaintiff can establish violation of the right to access to the courts "by showing that the defendants' actions foreclosed her from filing suit in state court or rendered ineffective any state court remedy she previously may have had." *Id* at 1264. In the circumstances of this case, however, plaintiff failed to show that defendants' actions actually foreclosed her state remedies or rendered any resort to state court futile. *Id.*

In *Delew v. Wagner*, 143 F.3d 1219 (9th Cir. 1998), husband and parents of woman who was killed by an automobile driven by the wife of a state police officer stated a cause of action under 42 U.S.C. § 1983, based on allegations that defendant law enforcement officers covered up evidence that the driver was under the influence of alcohol, rendering ineffective plaintiffs' wrongful death claim. The court stated, "the Constitution guarantees plaintiffs the right of meaningful access to the courts, the denial of which is established where a party engages in pre-filing actions which effectively covers up evidence and actually renders any state court remedies ineffective." *Id.* at 1222.

Petitioners argue that these decisions reflect such "disagreement" among the courts and such a "nebulous" state of the law that they could not reasonably know that giving false or misleading information to Ms. Harbury might violate her rights. Pet. Br. at 41-42. In particular, Petitioners focus on the

more recent cases, *Swekel* and *Delew*, as reflecting "just the kind of discord among the lower courts that *compels* a finding of qualified immunity." Pet. Br. at 46.

ATLA submits that the decisions, both before and after 1993-94, are in unanimous agreement that

> [I]f state officials wrongfully and intentionally conceal information crucial to a person's ability to obtain redress through the courts, and do so for the purpose of frustrating that right, and that concealment and the delay engendered by it substantially reduce the likelihood of one's obtaining the relief to which one is otherwise entitled, they may have committed a constitutional violation.

Crowder v. Sinyard, 884 F.2d 804, 812 (5th Cir. 1989), cert. denied, 496 U..S. 924 (1990) (summarizing the holding of *Ryland*).

The discord perceived by Petitioners is merely the factual determination in each case as to whether the official misconduct substantially prejudiced plaintiff's ability to pursue the underlying claim so as to constitute a violation of meaningful access to the courts. For example, Petitioners mischaracterize the Ninth Circuit's disposition in *Delew* as a dismissal of plaintiffs' constitutional claim. Pet. Br. at 24 & 45. In fact, the court reversed the district court's dismissal, holding that plaintiffs had stated a claim for denial of access to the courts. 143 F.3d at 1222. Because plaintiffs' wrongful death action was still pending, the court remanded with instructions for the district court to dismiss the complaint without prejudice so as to allow plaintiffs to refile with allegations that defendants' cover up did in fact render that remedy ineffective. *Id.*

In *Swekel*, where defendants allegedly concealed the identity of the driver in a fatal accident, state law may have allowed plaintiff to proceed with her wrongful death action without that information. The court specifically condemned the alleged conduct as "reprehensible." 119 F.3d at 1264. However, she had not established that it had in fact foreclosed her ability to file suit.

Unlike the plaintiffs in the above-cited cases, Jennifer Harbury was not seeking money damages for past death or injury. The legal remedy she sought was information and injunctive relief that might have resulted in saving the life of her husband, a fact that Petitioners well knew. She may or may not have succeeded, just as the plaintiffs in *Bell*, *Ryland* and the other cited cases may or may not have prevailed in their wrongful death claims. Accepting Respondent's allegations as true, the officials in this case did not simply make it more difficult to obtain redress. By forestalling legal action by Harbury until after her husband was dead, they utterly destroyed any hope of obtaining the relief she sought.

None of the decisions described above would suggest to a reasonable official that covering up the circumstances surrounding Bamica's captivity and death was lawful or could not violate Ms. Harbury's right of access to the courts.

B. This Court Should Not Create A New Immunity For Disinformation In The Name Of National Security.

With all due respect, the brief of the Solicitor General is rendered less helpful by its strenuous insistence that the court below has imposed a new

affirmative duty on government officials to investigate and turn over its information to any inquiring citizen. *See* Brief of United States at 5, 8, 12 & 22.

ATLA submits that this is not a fair reading of the lower court's opinion and that much of the Solicitor General's effort strikes hard blows against an imagined foe. The court of appeals specifically stated that Ms. Harbury,

> never alleges that defendants breached a duty to disclose information to her. Rather, she alleges that they affirmatively deceived her into believing that they were actively seeking information about her husband. Instead of saying (as they could have) that they were unable to discuss Bamaca's situation, they sought to lull her into believing that they were working on her behalf.

Pet. App. 23a.

ATLA submits that the decision below falls within the principles that were well-established by other federal courts before 1993-94. *See, e.g., Barrett v. United States*, 798 F.2d 565, 575 (2d Cir. 1986), quoted above.

Instead, it is the Solicitor General who urges this Court to break new ground. He asks this Court to recognize, as an exception to the Due Process guarantee, that government officials must sometimes lie to the American people in order to serve the American people. "[T]he perhaps unfortunate reality," he states, "is that the issuance of incomplete information and even misinformation by government may sometimes be perceived as necessary to protect vital interests." Brief of United States at 23. This includes situations where "the government official may actually 'intend' to forestall litigation." *Id.*

From this novel perspective, the Solicitor General suggests that Ms. Harbury had a duty to assume that Respondents were being untruthful with her. She should have aggressively pursued all available legal means to compel government officials to do what they had assured her was already being done. *Id.* at 18. Because she relied on Respondents' false assurances, it is argued, failure to save her husband's life "resulted from her voluntary choice." *Id.*

Indeed, the Solicitor General argues that the American people are better served by officials who give false information regarding sensitive subjects rather than issue a "no comment." *Id.* at 23-24.

The sole authority that this cynical view is or ought to be enshrined in law is a phrase taken from *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972) that "misrepresentations" may be "condoned in the political arena." Brief of United States at 23.

The Court there was not addressing the actions of public officials, but of private citizens who filed baseless lawsuits as part of a lobbying effort. More importantly, the passage cited offers no support for the Solicitor General's proposition:

> There are many other forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations. Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process. . . . [It may be] established that abuse of those processes produced an illegal result, viz., effectively barring respondents from access to the agencies and courts. Insofar as the administrative or judicial processes are involved, actions of that kind cannot acquire

> immunity by seeking refuge under the umbrella of 'political expression.'

Id.

The fact is that issuing false information, even as to matters touching upon national security, is not the policy of the United States. Such a policy might be expected to apply most directly to the Department of Defense, currently fighting America's war on terrorism. However, the Defense Department recently made clear that such a policy does not exist and would not serve America's interests.

Commenting on the Department's new Office of Strategic Influence, created after the Sept. 11 attacks, Secretary of Defense Donald H. Rumsfeld emphasized:

> What people have to understand about this is very clear: number one, government officials, the Department of Defense, this secretary and the people that work with me tell the American people and the people of the world the truth."

James Dao, "Rumsfeld Says Pentagon Plan Won't Include Lies," *New York Times*, Feb. 20. 2002

Douglas Feith, undersecretary of defense for policy and the official responsible for overseeing the new office explained its policy:

> Defense Department officials don't lie to the public. We are confident that the truth serves our interests in the broadest sense of our national security and specifically in this war.

Vernon Loeb and Dana Milbank, "New Defense Office Won't Mislead, Officials Say," *Washington Post*, Feb. 21, 2002, at A15.

ATLA submits that the principle reflected in this statement of government policy, not the cynical view

expressed by the Solicitor General, has been, is, and ought to be the law of the land.

CONCLUSION

For the above reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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